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Supreme Court U. S.
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IN THE

Supreme Court of the United States

ON APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

OCTOBER TERM, 1905.

NO. 180.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of Dresser & Co.,

Appellant,

against

EMMA B. DRESSER,

Appellee.

BRIEF FOR APPELLEE.

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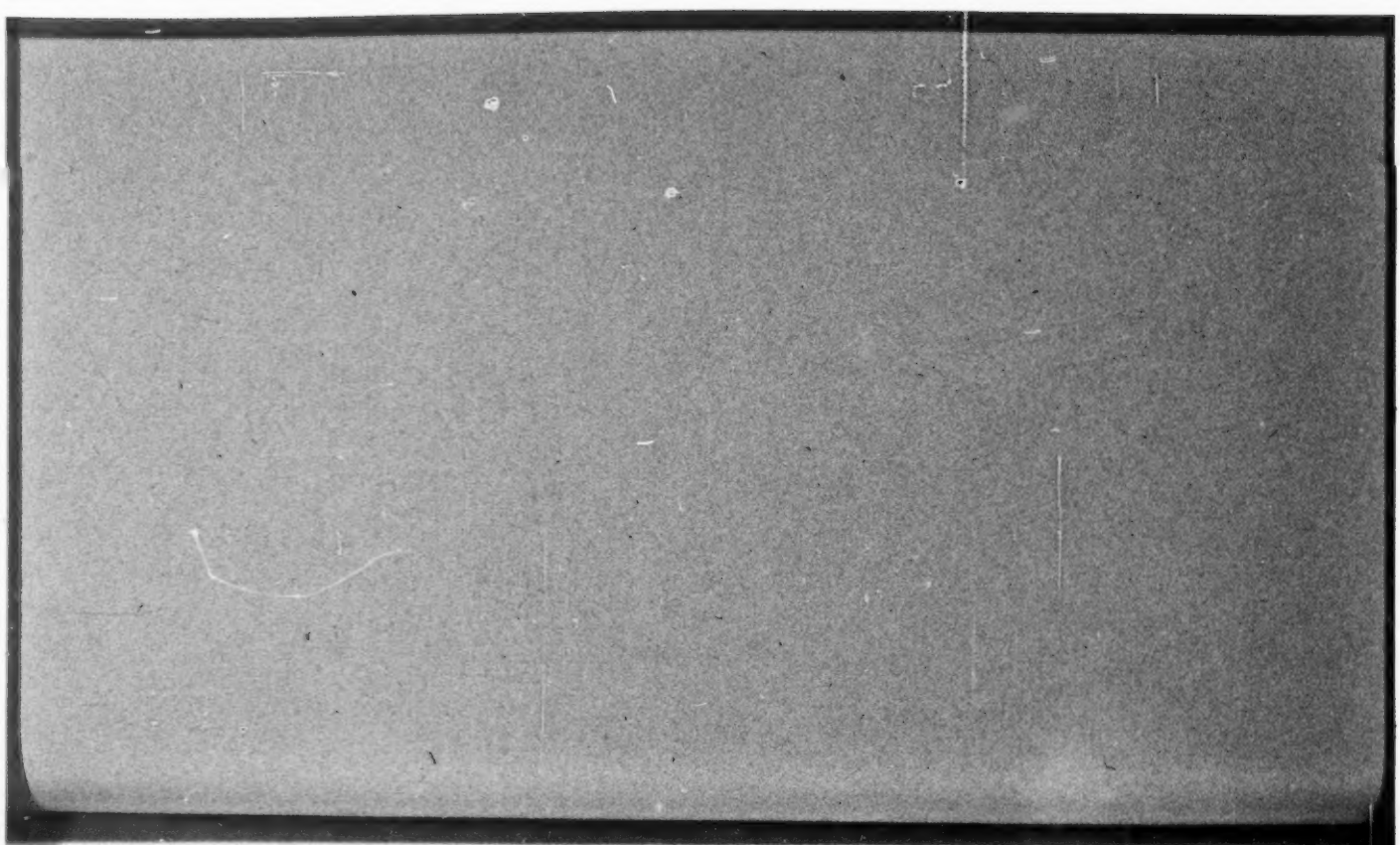

Supreme Court of the United States.

OCTOBER TERM, 1905.

EDWARD B. WHITNEY, as Trustee in Bankruptcy of DANIEL LE ROY DRESSER and CHARLES E. REISS, individually and as members of the firm of DRESSER & Co., Bankrupts, Appellant, against EMMA B. DRESSER, Claimant, Appellee.	No. 180.

BRIEF FOR APPELLEE.

Statement.

This is an appeal from a decree of the United States Circuit Court of Appeals, Second Circuit (*Record, p. 26*), affirming an order of the District Court of the United States for the Southern District of New York (*Record, p. 18*), entered and filed herein April 4th, 1904, affirming the decision of the Referee dismissing the trustee's objections to the appellee's claim against the bankrupt's estates (*Record, pp. 17-18*).

A proof of claim of the appellee (*Record, pp. 1-2*), was duly filed August 26th, 1903, and on January 21, 1904, the trustee filed objections to the allowance of the claim (*Record, pp. 5-6*). On March 3, 1904, claimant filed an amended proof of claim (*Record, pp. 2, 3, 4*). No objections were filed to the amended proof of claim, nor were the trustee's objections, already filed, amended. The trustee elected to have the filed objections apply to the amended proof of claim, and it was so understood by all parties.

On March 7th, 1904, a hearing on the trustee's objections was had, and testimony offered on behalf of the trustee (*Record, pp. 7-17*). At the close of the testimony a motion to dismiss the objections and allow the claim was granted by the Referee (*Record, p. 11*), from whom the trustee obtained a certificate (*Record, pp. 17-18*). The ground of the Referee's decision, as set forth in his certificate is as follows:

> The verified amended proof of claim filed by claimant is, on its face, *prima facie* proof of the indebtedness of Dresser & Co. to claimant and the testimony taken herein is insufficient to rebut such proof (*Record, p. 18*).

An appeal from the decision of the Referee was taken by the trustee to the United States District Court for the Southern District of New York. The Referee's decision was affirmed and an order to that effect entered April 4th, 1904 (*Record, p. 18*). From this order the trustee appealed to the United States Circuit Court for the Second Circuit. The order of the District Court was unanimously affirmed and an opinion filed January 9th, 1905 (*Record, pp. 21-25*). From the decree entered thereon January 19, 1905 (*Record, p. 26*), and on

the certificate of one of the Justices of this Court (*Record, p. 26*), made pursuant to Sec. 25, b. Sub. 2, of the National Bankruptcy Act of 1898, the trustee appeals to this Court.

The appellant's assignments of error substantially assert:

That claimant's amended proof of claim (*Record, pp. 2-5*) is insufficient on its face.

That the filing of the trustee's objections raises an issue as to which the burden of proof is on the claimant.

That, assuming the burden of proof to be on the objector, sufficient evidence has been offered by the trustee to warrant a disallowance of the claim (*Record, p. 27*).

POINTS.

FIRST POINT.—The amended proof of claim shows on its face an indebtedness of Dresser & Company.

The amended proof of claim (*pp. 2-5*) states in unequivocal language that "Daniel Le Roy Dresser and Charles E. Reiss, *composing the firm of Dresser & Co.*, * * * were and still are justly and truly *indebted to deponent* in the sum of $88,145;" then follows a statement of the consideration for the indebtedness. This statement contains many allegations that are unnecessary and evidentiary in character, but its terms are very clear and require no comment.

For some inexplicable reason the trustee has chosen to consider both the original proof of claim

filed August 26, 1903 (*pp. 1-2*), and the amended proof of claim, filed March 3, 1904, together. He points out that the first proof of claim contains an allegation (set forth in the statement of the consideration) that claimant, "at the request of Daniel Le Roy Dresser, turned over to him" certain securities, which securities, as "deponent is informed and believes," * * * "were deposited as collateral for loans, the proceeds of which loans were turned over to the firm of Dresser & Co. * * * and used by said firm."

Assuming that for some reason the well-established rule that the amended proof of claim supersedes the proof of claim first filed is not applicable to the present case, and that the original proof of claim is a matter for consideration under the Referee's certificate, it is submitted that there is nothing contained in the proof of claim filed August 26, 1903, that is inconsistent with the allegation of Dresser & Co.'s indebtedness to claimant.

The original proof of claim reads as follows:

> "*That Daniel Le Roy Dresser and Charles E. Reiss, composing the firm of Dresser & Co.*, the persons against whom a petition for adjudication in bankruptcy has been filed, at and before the filing of said petition, *were and still are justly and truly indebted to said deponent*," etc.

Then follows this allegation:

> "The consideration of said debt is as follows:
>
> "At the request of the now bankrupt Daniel Le Roy Dresser deponent turned over to him the following securities, owned by her, to be deposited as collateral for loans, or for other purposes" (here follows a list of the securities).

The latter statement, immediately following the

allegation contained in the first paragraph of the proof of claim is susceptible of but one interpretation, viz.: That Daniel Le Roy Dresser borrowed, *as a member of the firm of Dresser & Company*, the securties from the claimant, *for firm purposes alone*. If this were not so, the entire proof of claim would mean nothing, unless it be shown that the second statement did not in any way refer to the first. Such a contention, however, could not be seriously urged. After the allegation that Dresser & Company were indebted to the claimant in the sum of $156,530 the first proof of claim continues: "*the consideration of said debt* is as follows"; then follows the second statement. It is submitted that no closer connection between the two statements could be made than by the words used.

The appellant takes exception to the statement in the opinion of the Court below, referring to the amended proof of claim, that "the bankrupts took them (the securities), obtained money thereon which they used in their business, and agreed to return them to the claimant." It is submitted that this statement is a fair interpretation of the amended proof of claim.

There is nothing inconsistent between the statement that Dresser & Co. is indebted to claimant, and the allegation contained in the first proof of claim that the securties were turned over to Daniel Le Roy Dresser and deposited by him as collateral for loans, the proceeds of which were used by the firm. It is submitted that if the securities were turned over to a messenger of the firm, the liability of the firm would be just as great as if a meeting of the firm's members had been called, and the securities turned over in their presence. In any case, the fact remains (and it is so

stated in the proof of claim first filed) that it was a loan of the securities directly to the firm, and the manner of turning them over or the channel through which they found their way to the firm is immaterial. Except for the amount, the amended proof of claim is merely an unnecessary elaboration of that first filed, showing the channels through which the securities passed.

The appellant contends that claimant's "right to recover * * * arises upon the equitable principle of subrogation."

The following is then assumed as a fact (*Brief, p. 23*): "Mrs. Dresser does not claim any contract to have been made *with her*. She merely sues upon an alleged assumption of this liability, made in an alleged contract between Daniel Le Roy Dresser of the first part and Dresser & Co. of the second part."

A reading of the amended proof of claim is sufficient to show this statement to be an erroneous conclusion. The allegations clearly show a substitution of debtors—a complete novation. There was a promise of Dresser & Co. *to the claimant*—not to Dresser—to return the securities. In consideration of this promise claimant forbore making any demand for a return thereof, but on the other hand permitted Dresser & Co. to take over the securities, or the beneficial use thereof.

The claimant is not claiming through Dresser, but directly on the obligation of Dresser & Co. to return the securities.

In this connection attention should be called to the following unwarranted statement contained in the respondent's "Statement of the Case" (near

the top of page 3 of his brief), and relating to the proof of claim first filed:

"The original claim was that she had loaned her husband certain securities," etc. There is nothing in the record which warrants this statement as one of fact.

As is pointed out in the opinion of the lower court (*Record, p.* 24), there is a clerical omission in the allegation of the amended proof of claim, concerning the turning over to the bankrupts of the money derived from the loans made on claimant's securities.

The words contained in one of the paragraphs of the amended proof of claim (*Record, middle p.* 3) are not repeated in the second succeeding paragraph (*Record, near bottom, p.* 3). The omission occurs immediately before the words: "and used by said firm in its business." The words omitted are: "and the proceeds of the loans for which said securities had been deposited by said firm as collateral were turned over to said firm of Dresser & Co."

The presence or absence of these words is, however, immaterial. Such an allegation, evidentiary in character, while proper, is unnecessary.

It is singular to find the trustee insisting that this omission is fatal, and in the same point urging that the notion that a firm estate becomes liable if money is borrowed for its benefit is "erroneous but popular" (*sic*).

SECOND POINT.—The burden of proof having been assumed by the trustee, the question of where it rested is not one with which the Court is concerned on this appeal.

This point was not made in the Court below, but had it been urged, this view would probably have been adopted (see second paragraph of opinion of Cox, J., *Record*, *p.* 23).

Nowhere in the record of the trial of the objections before the Referee does it appear that the trustee regarded the burden of proof as being upon the claimant. The trustee did not except to any ruling of the Referee on this point; in fact, an examination of the minutes shows that no ruling was made nor was the question even raised. The learned Circuit Court of Appeals remark in their decision (*Record*, *bottom p.* 22) that "the trustee assumed the burden and introduced evidence"; the Record shows clearly that that is exactly what occurred.

THIRD POINT.—In any event the verified amended proof of claim constituted prima facie proof of the indebtedness of Dresser & Co., and the burden of proof was on the trustee to rebut the presumption thus raised.

If this Court is of the opinion that the question of where the burden of proof rested is before it

on this appeal, then, it is submitted, the burden was on the objector.

That the verified amended proof of claim is *prima facie* evidence of indebtedness requiring the trustee to produce evidence of sufficient force to rebut the presumption thus raised, is a proposition well established and squarely decided by THOMAS, D. J., in *Re Sumner*, 101 Fed. Rep., 224.

The following is an extract from the opinion:

> "Just here arises the second inquiry: If objection be made to the claim, must the claimant present evidence in addition to the statement provided for in Sections 57*a* and 57*b*, or has he made such a *prima facie* case as to place the burden upon the objector of furnishing evidence that shall overcome the evidence conveyed to the Court by the statement? It is apparent that, if the statement makes a *prima facie* case, the claimant may rest, and await the introduction of evidence that shall be opposed to the sufficient evidence presented by the claimant. * * *
>
> "It is apparent from subdivision '*f*' that the statute contemplates that, after the claimant has presented his claim in the prescribed manner, objection may be made, and that thereafter the question of the objection shall be taken up and decided. This does not mean that the burden of proof is upon the objector to disprove the claim, but that he shall produce evidence whose probative force shall be equal to, or greater than, the evidence offered in the first instance by the claimant. The burden of proof is always upon the claimant, but the statute points out how he may meet it for the purpose of making a *prima facie* case; and further provides that a creditor, or other person entitled, may, by interposing objection, so relate himself to the record as to be able to give evidence in opposition to the claim. Therefore, if the

> creditor shall have complied with Section 57*a*, by filing with the referee a statement under oath, he shall be entitled to have his claim accepted, unless from some circumstance the referee demands further evidence from him, or unless an objection is interposed, and such objection is followed by evidence offered by the objector, *which shall overthrow the presumptive case made by the claimant.*"

In *Re Shaw*, 109 Fed. Rep., 780 (E. D. Pennsylvania), the trustee filed an objection to the allowance of a claim upon the ground that claimant had been given a preference by the bankrupt within four months of the filing of the petition.

J. B. McPherson, D. J.:

> "What was the effect of this objection? Certainly to suspend the allowance of the claim until the matter could be further inquired into; *the burden of proof being upon the objector.*"

The trustee then proved the preference by the bankrupt to the claimant, but the claimant alo testified that the preference had been surrendered; claimant's right to urge his claim was therefore revived, and the Court held that the claim should be allowed without any further proof than the verified proof of claim.

In *Re Doty*, 5 Am. B. R., 58 S. W. Dexter, Referee, states the rule as follows:

> "In the ordinary case, objection is usually made at the first meeting of creditors, *before* the claim is actually allowed or during the pendency of said meeting. The referee thereupon proceeds to hear the evidence offered by the objecting creditor, *who has to sustain the burden of proof.* The claimant lawfully rests upon the *prima facie* statement presented by his sworn claim" (citing *In Re Sumner, supra*).

In Re Cannon, 133 Fed., 837, the District Court or the Eastern District of Pennsylvania says in its pinion (p. 838): "The burden is on the trustee objector) to overcome the *prima facies* of the for- al proof."

In Re Carter, 138 Fed., 846 (District Court for ie Western District of Arkansas), squarely holds iat, where a claimant against a bankrupt's estate resents its claim in proper form, duly verified, ich claim constitutes a *prima facie* case in favor the claimant, and the burden of proof is there- on shifted to the objector.

It is submitted that the opinion of the Circuit ourt of Appeals in this case (*Record, pp. 21-25*) lso reported in 135 Fed., 495), contains a correct tement of the law.

So far as the decision in *Re Wooten* (cited by pellant) is concerned, it is sufficient to say that ne of the many peculiar and suspicious facts ich there appeared, are present in this case.

The appellant also cites *In Re Domenig, 128 Fed.* . The sole question in that case was whether Pennsylvania statute providing that a wife may t sue her husband, except for divorce or for re- very of her separate property after his desertion, events her from proving a claim against his estate bankruptcy; and the Court held that it did not.

The appellant, all through his brief, and in his tatement of Facts," refers to the claimant as the e of one of the bankrupts, and dwells on the picion that should be attached to everything this y has done or said. In fact, on page 18 of his f, he charges her with perjury. It seems to us y strange that the appellant should be so ready throw the cloak of suspicion and falsity over claim, and make the grave charge that he does, n on page 5 of his brief he concedes that the

amount mentioned in the proof of claim is due claimant, and on page 28 admits that the claim is a just one as against Dresser's estate.

It will also be noticed in this connection that nowhere is this question raised by the trustee's objections. What is more, there is nothing in the record to show that claimant was, at the time of the filing of the petition, the wife of one of the bankrupts, or even a married woman. The only reference to any such relation is the testimony of the trustee's witness Northrop (*Record, top p.* 11) that he "*understands* her *to be* the wife of D. LeRoy Dresser"; the date of the hearing was March 7, 1904.

The appellee's only reason for calling attention to this matter is that it does not seem proper to inject matter into this appeal which has no place here, and which is not included in the trustee's objections, nor in his assignments of error, nor in the record.

The appellant, in his brief, refers to a decision of McPherson, D. J., in *Re Shaw*, 112 Fed. Rep., 947, upon the identical claim referred to in the same Judge's opinion reported in 109 Fed. Rep. (*supra*). It is submitted that a mere perusal of that decision is sufficient to point out the difference between the facts of that and those of the present case. A discussion of what that difference is seems unnecessary.

The appellant, in attempting to draw an analogy between State insolvency laws and the Bankruptcy Act, cites *Matter of Jesclson*, 10 Daly, 104, for the proposition that under the former laws the burden of proof is upon the creditor. The appellee does not think any light can be thrown on the questions involved in this appeal by a discussion of State

insolvency laws, but desires to call attention to the fact that in the Jeselson case the *assignor* objected to the allowance of the claim; he denied that he owed the creditor the amount of his claim; nor was the claim mentioned in the schedule of the assignor. None of these facts appears in the present case. If the trustee had introduced evidence to the same effect here the Referee might well have held that he had overcome the presumption raised by the amended proof of claim and shifted the burden of proof to the claimant.

In *Bank v. Lenahan*, 66 Md., 461, referred to by appellant, a secured creditor (a bank) had filed an affidavit setting forth a judgment for the gross amount of the loan to the assignee, and the nature of the collateral pledged to secure the loan. The creditor contended that it was entitled to dividends on the gross amount and all that the Court decided was that the affidavit, on its face, did not warrant any such conclusion, as it was not shown that the bank had not collected part of the judgment.

The Court say (*p. 469*): "According to this rule (filing of claimant's oath) it was necessary for the bank to file an affidavit showing that it had not received any portion of the sums for which the judgments "were rendered, except such as were credited."

The final result reached in the Maryland case (that the amount realized by the sale of collateral, should, for the purpose of declaring dividends, be deducted from the amount of the loan), is squarely opposed to the doctrine of the New York Courts (*People v. Remington*, 45 Hun, 329, aff'd., 121 N. Y., 675); further illustrating the futility of attempting to draw an analogy between the Bankruptcy Act and the State Insolvency Laws.

The appellant also refers to the practice under the Bankruptcy Act of 1867, and cites *In re Northern Iron Company*, 14 N. B. R., 356 (E. D. Mich.) That case merely held that where, at the holding of an election for assignee, doubtful claims are presented by the officers of the bankrupt corporation, the Register should subject them to a close scrutiny; and if the claims are not susceptible of ready and demonstrable explanation, a case of suspicion should be deemed to exist. Such was found to be the case, and the claims were *postponed* until after the election of the assignee. The evident purpose of the filing of the claims was to control sufficient votes to elect one of the officers assignee; a mere perusal of the claims (*p. 357*) is sufficient to understand their suspicious character. The decision went no further of course than to sustain the Register in his refusal to accept claimants' votes on the election of an assignee, or, to use the appellant's remark with reference to the decision of Judge Lowell in *Re Saunders*, 2 Low. 444, was "made upon the preliminary hearing for the purpose of deciding who was entitled to vote for assignee."

The opinion of Judge Lowell in *Re Bartusch*, 9 N. B. R., 478, does not in any way modify his opinion in *Re Saunders* (*supra*). In the former case he says:

> "He (Register) must, of course, decide upon each debt separately, and *upon evidence which satisfies him that there is a judicial doubt of its validity* or of the right of the creditor to prove it" (italics are ours).

The case of *Re Knoepfel*, 1 Ben., 398, referred to in appellant's brief, merely holds that where it appears *by the proof of claim* that the debt is evi-

denced by a promissory note, the latter should be produced upon request.

In *Matter of Jaycox*, 7 N. B. R., 303, the proofs of claim were not in the form prescribed by the Act of 1867, nor did they contain the allegations required by the Statute.

The practice under the Bankruptcy Act of 1867, on the trial of objections to a claim, is clearly set forth in *Re Felter*, 7 Fed. Rep., 904, and in *Re Saunders* (*supra*).

The opinion in the latter case is as follows (*p.* 447):

> "I am of the opinion that the holder of a note overdue, making due affidavit as required by the Statute, makes out his *prima facie* case, subject to the discretion of the Register and Court to order further proof, and to the right of any creditor or person interested to offer counter proof."

The rule as laid down in the opinion of the Court in the Felter case is as follows:

> "A creditor's claim, duly proved according to the provisions of the bankrupt act, is, *prima facie*, good. The burden of showing that the claim is founded in mistake or fraud lies upon the assignee or the creditor attacking the proof."

In Subdivision *C* of Point II of his brief, the appellant takes the same position that he did in the Court below, and urges that the Statute of Frauds is a bar to appellee's claim, although no such objection had been raised by the trustee before the argument in the Circuit Court of Appeals, nor does the record present any such question.

The appellant contends that, as no written promise of Dresser & Co. is annexed to the proof of claim, it must be presumed that the promise was oral. Why such a presumption? Why not a presumption the other way? For if the contention of the defendant, that a promise of this kind should be in writing is correct, then, following defendant's reasoning, should it not be presumed to be in writing, since it would be of no effect if verbal?

There is no proof whether this promise is or is not in writing, but the trustee could easily have made proof by calling either member of the firm of Dresser & Co. or the claimant.

On this point the Lower Court very properly say in their opinion:

> "*Non constat* the writing which the appellant considers necessary may be in the possession of the claimant to be produced when an issue is presented requiring its production (*Record, bottom p. 23*).

But assuming that all transactions on and after May 1, 1897, between Dresser & Co., and the claimant (see Amended Proof of Claim, *Record, p. 3*) were oral, how would they fall within the statute?

Dresser & Reiss, co-partners, composing the firm of Dresser & Co., succeeded to the business of D. Le Roy Dresser, taking over *all* assets (including, necessarily, claimant's securities, or the moneys loaned thereon), and assuming all liabilities, including that for a return of claimant's securities. In other words, they received claimant's securities, with the privilege of borrowing money thereon; and they were, therefore, under obligation to return the securities. There was then a *new consideration*, which fact alone sufficiently establishes that the so-called "promise," securing,

as it does, a benefit to the promiser, is not within the statute. (*First National Bank of Sing Sing vs. Chalmers*, 144 N. Y., 432; *Wales vs. Stout*, 115 N. Y., 638; see, also, *Ackley vs. Parmenter*, 98 N. Y., 425).

Dresser & Co. assumed, with deponent's knowledge and consent, the obligation of D. Le Roy Dresser; there was, therefore, a discharge of the original obligation and the substitution of a new debtor; these are sufficient to make a verbal promise valid (*Booth vs. Eighmie*, 60 N. Y., 238; *Wyman vs. Smith*, 4 Super. Ct. (2 Sandf.), 331; *N. Y. & Erie Co. vs. Gilchrist*, 16 How. Pr., 564; *Olmstead vs. Greenly*, 18 Johns, 12; *May vs. National Bank of Malone*, 9 Hun, 108; jt. affd. 73 N. Y., 599; *First National Bank vs. Chalmers*, 120 N. Y., 658; *Meriden Britannia Co. vs. Zingsen*, 48 N. Y., 247; *Rudel vs. McMorran*, 17 Weekly Dig., 258).

FOURTH POINT.—The evidence introduced by the trustee is insufficient to rebut the presumption raised by the verified amended proof of claim.

The appellant refers to an "'erroneous but popular notion,' that the firm estate becomes liable if money is borrowed by an individual partner upon his own credit for the benefit of the firm." It does not appear that any useful purpose would be served by discussing an academic question on this appeal.

The testimony of the witnesses called by the trustee merely tends to show that certain banks loaned money on part of claimant's securities, tak-

ing the note of D. Le Roy Dresser, and in some cases turning over to Dresser a check drawn to his order. If anything, this testimony supports claimant's allegations.

The claimant here is not one of the banks with which claimant's securities were deposited, but the owner of collateral loaned to the bankrupt firm.

It is submitted that the claimant is not concerned with the manner of obtaining loans by Dresser & Co. or its predecessors, upon her securities. Claimant distinctly alleges that in 1896 she loaned the firm of Dresser & Goodrich the use of the securities, and that at the time of the formation of Dresser & Co., the latter firm, at their request and with her consent, received the use of said securities and assumed the liability for a return thereof.

The check of the United States Mortgage and Trust Company (Exhibit D, *Record, p. 17*) illustrates the fallacy of the trustee's reasoning, for the endorsement appearing on the check clearly shows that the money borrowed was received and deposited by Dresser & Co.

All of the allegations contained in claimant's proof of claim remain uncontradicted and unaffected by the testimony of the trustee's witnesses, and the trustee having rested, the granting of claimant's motion to dismiss the objections and allow the claim, was proper.

FIFTH POINT.—The decree of the Circuit Court of Appeals, affirming the order of the District Court, affirming the decision of the Referee that the trustee's objections be dismissed and the claim allowed, should be affirmed with costs.

The appellant observes that "as the time for presenting claims has expired, we might possibly take the point that it cannot be presented at all;" and that "we would not oppose a provision in a judgment of reversal to the effect that the claim may be amended so as to be presented against the proper party."

The fact that only one side has rested, and that this is an appeal from the granting of the motion to dismiss the objections at the close of the trustee's case, seems to be overlooked.

It is respectfully submitted that in event of reversal, the entire case will be reopened and an opportunity given to claimant to introduce testimony.

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Of Counsel for Appellee.

OPINION

Supreme Court of the United States.

No. 180.—October Term, 1905.

Edward B. Whitney, as Trustee in Bankruptcy of Dresser & Co., Appellant, vs. Emma B. Dresser.	Appeal from the United States Circuit Court of Appeals for the Second Circuit.

[February 19, 1906.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an appeal from the allowance of a claim of Emma B. Dresser against the firm of Dresser & Company, bankrupts, the members of the firm being Daniel Le Roy Dresser and Charles E. Reiss. The allegations of the amended proof, so far as necessary to be stated, are that the bankrupts are justly and truly indebted to the deponent in the sum of $88,145, upon the following consideration. Before May, 1896, the deponent lent certain specified shares of stock to the firm of Dresser and Goodrich for the purpose of the firm's borrowing money upon the same, &c., and the firm did so. In May, 1896, the firm was dissolved, Daniel Le Roy Dresser took over its assets and assumed its liabilities, including that to the deponent with her consent, "and the proceeds of the loans for which said securities had been deposited by said firm as collateral were turned over to said Daniel Le Roy Dresser and used by him in his business." In May, 1897, the present bankrupts formed their partnership, taking over the assets and assuming the liabilities of said Dresser. At the request of said Dresser and Reiss with deponent's knowledge and consent the liability of Dresser to the deponent was assumed by the firm, "and used by said firm in its business." Evidently some words were omitted at this point, by mistake, and we agree with the Court below that the most reasonable view is that it was intended to repeat the phrase quoted above in speaking of the transfer from Dresser & Goodrich to Dresser.

The trustee objected to the allowance of the claim against the assets of the partnership and put in evidence before the referee, the main fact proved being that Dresser personally signed the notes on which were made the advances for which the stocks were pledged. This was relied on, in connection with the form of the proof of claim before it was amended, to show that the stocks really were lent to Daniel Le Roy Dresser alone. On the other hand it appeared that some, at least, of the checks for the money lent went to the firm, and all the evidence was reconcilable with the

averments of the amended claim. The referee ruled that the verified amended proof of claim was *prima facie* proof of the indebtedness of Dresser & Co. to the claimants, held the evidence introduced insufficient to rebut it, and dismissed the objection. The District Judge sustained the action of the referee and his order was affirmed by the Circuit Court of Appeals. *In re Dresser*, 135 Fed. Rep. 495. 68 C. C. A. 207.

It is urged that the claim is bad on its face because it showed at most a promise to answer for the debt of another, required to be in writing by the New York Statute of Frauds, and no such writing was filed with the proof in accordance with the requirement of the Bankruptcy Law. § 57 *b*. It is unnecessary to consider whether the objection is open or otherwise sound, because, if it is, which we are far from intimating, the claim clearly imports a novation, that is to say, the giving and accepting of the responsibility of the present firm in place of that of Daniel Leroy Dresser alone. The only question warranting the appeal is whether the sworn proof of claim is *prima facie* evidence of its allegations in case it is objected to. It is not a question of the burden of proof in a technical sense—a burden which does not change whatever the state of the evidence—but simply whether the sworn proof is evidence at all.

The Circuit Court of Appeals observed that the proof of claim warrants the payment of a dividend in the absence of objection, and, therefore, must have some probative force. In reply it is argued that what is done in default of opposition is no test of what is evidence when opposition is made; that a judgment may be entered on a declaration for want of an answer, yet a declaration is not evidence; that it is contrary to analogy to give effect to an *ex parte* affidavit, and that on general principles it is the right of any party against whom a claim is made to have it proved, not only upon oath, but subject to cross-examination.

Notwithstanding these forcible considerations we agree with the Circuit Court of Appeals. The prevailing opinion, not only in the Second Circuit, but elsewhere seems to have been that way. *In re Sumner*, 101 Fed. Rep. 224. *In re Shaw*, 109 Fed. Rep. 780. *In re Cannon*, 133 Fed. Rep. 837. *In re Carter*, 138 Fed. Rep. 846. *In re Doty*, 5 Am. B. R. 58. See also *In re Saunders*, 2 Low. 444, 446. *In re Felter*, 7 Fed. Rep. 904, 906. The alternative would be that the mere interposition of an objection by any party in interest, § 57 *d*, would require the claimant to produce evidence. For if the formal proof is no evidence a denial of the claim must have that effect. If it does not, then the formal proof is some evidence even when there is testimony on the other side. The words of the statute suggest, if they do not distinctly import, that the objector is to go forward, and thus that the formal proof is evidence even when put in issue. The words are: "Objections to claims shall be heard and determined as soon" &c. § 57 *f*. It is the objection, not the claim, which is pointed out for hearing and deter-

mination. This indicates that the claim is regarded as having a certain standing already established by the oath. Some force also may be allowed to the word "proof" as used in the act. Convenience undoubtedly is on the side of this view. Bankruptcy proceedings are more summary than ordinary suits. Judges of practical experience have pointed out the expense, embarrassments and delay which would be caused if a formal objection necessarily should put a creditor to the production of evidence or require a continuance. Justice is secured by the power to continue the consideration of a claim whenever it appears there is good reason for it. We believe that the understanding of the profession, the words of the act and convenient and just administration all are on the side of treating a sworn proof of claim as some evidence even when it is denied.

Order affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.